

Roles and Responsibilities of the ZBA

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There is a huge amount to learn:

- Why is there a ZBA?
- Jurisdiction and Powers
- Equitable Waiver of Dimensional Requirements
- Administrative Appeal
- Special Exceptions
- When is a variance not required?
- Variances

Why is a ZBA established?

- RSA 673:1, IV, every zoning ordinance must include provision for a ZBA
- A constitutional “safety valve” to prevent a “taking”
- A quasi-judicial check and balance on the powers of the municipal executive, ie. Planning Board, Building Officials, and the Board of Selectmen

Jurisdiction and Powers

- RSA 674:33: Administrative appeal
- Variances, and special exceptions
- RSA 674:33-a: Equitable Waiver of Dimensional Requirements
- RSA 674:41: Class VI or private road
- RSA 674:34: Building Code Appeals

The ZBA Has No Legislative Powers

- The zoning ordinance or building code is adopted by town meeting or the city or town council
- The Master Plan, and Subdivision and]Site Review regulations are created by the Planning Board
- The ZBA takes these documents as they exist, and does not change them

The ZBA Has No Executive Powers

- Building permits are issued by the Building Inspector or the Selectmen, not the ZBA
- Administrative officials operate the zoning ordinance and building code daily
- Administrative officials make decisions on enforcement actions, not the ZBA
- Road classification is not a decision for the ZBA

The ZBA is a Quasi-Judicial Body

- It has the final say on the *meaning* of the ordinance or building code.
- It has power to **overrule or modify** decisions made by executive officials
- Decisions must be based upon *evidence* in all cases
- The ZBA finds the facts, and applies legal tests to determine if relief should be granted

The Process of Adjudication

- Decisions are not to be made based upon the presence or absence of opposition.
- The only board where a minimum of 3 “Yes” votes required to act, rather than a majority
- Procedural due process is critical, ie. notice to all affected parties and an opportunity to be heard
- Applicants may not change their request for the type of relief during hearing; ie. A special exception cannot become a variance, due to notice issue

Equitable Waiver of Dimensional Requirements

- A simple remedy for honest mistakes
- Dimensional only, not “use” violations
- Burden of proof upon the applicant
- A “waiver”, and does not create a non-conforming use
- Future changes must comply with zoning in effect at the time

Equitable Waiver (cont.)

- Four elements:
 - 1. Violation not discovered until after substantial completion
 - 2. Violation a “good faith error”, by owner or building official, not ignorance, misrepresentation
 - 3. Does not create a “public or private nuisance”
 - 4. Cost of correction outweighs public benefit, and thus unfair.
- After 10 years, only elements 3 & 4 required.

Administrative Appeals, RSA 674:33 & RSA 676:5

- Has there been an ***error*** in any order, requirement, decision, or determination made by:
 - “Administrative Officials” RSA 676:5, II (b)
 - Building Inspector or zoning official
 - Board of Selectmen
 - Planning Board, RSA 676:5, III
 - Historic District Commission, RSA 677:17

Administrative Appeals

- “Administrative Officials”
 - Permits or certificates
 - Enforcement action, except “discretionary” acts
- Planning Board or HDC
 - The “construction, interpretation, or application” of the ordinance during subdivision or site review
 - Exception: innovative land use control issues will not be heard by the ZBA

When is ZBA Relief Not Needed? (Each of these a seminar in itself)

- Non-conforming uses or structures that predate the passage of the ordinance provision, ie. “grandfathered”
- Governmental uses that do not conform to the ordinance, subject to RSA 674:54
- The use is allowed pursuant to a federal or state law that expressly or impliedly ***preempts*** the local ordinance.

Special Exceptions, RSA 674:33, IV

- A use that is ***permitted*** by the ordinance, subject to additional criteria or standards
- Burden placed on the applicant to show that all of the additional criteria are met
- Runs with the land, but may be subject to conditions to prevent expansion or change, see Rye v. Ciborowski
- Some proposals may involve ***all types of relief***

What is a Variance?

The Disability Exception

- A variance serves to exempt a property and its use from the application of the zoning ordinance; cannot be granted unless all elements are met; runs with the land
- Exception is residence of a disabled person. Here, the “hardship” element erased, but does not run with the land. RSA 674:33, V

The Five Elements

- No diminution in the value of surrounding properties
- Not be contrary to the public interest;
- Owing to special conditions, a literal enforcement of the terms of the ordinance will result in unnecessary hardship;
- Spirit of the ordinance will be observed;
- Substantial justice will be done

1. Public Interest

- Burden: granting the variance will not do harm. Gray v. Seidel, 143 NH 327(1999)
- Cannot force an applicant to show there is a public benefit, simply that the use is “not contrary to the public interest”
- Variance must “unduly and to a marked degree conflict with the ordinance” Chester Rod & gun Club v. Chester (9/2/2005)

2. Spirit of the Ordinance

- How would this variance affect the ability to meet the purposes and goals of ordinance.
- Bacon v. Enfield, adding a space for a heating system on one structure will not greatly affect a lake shoreland area, but more space on all similarly situated structures would be significant as to congestion and overdevelopment.

3. Value Not Diminished

- Expert opinion not required, but often hear conflicting views of appraisers and real estate agents as to value and impacts
- Board members can accept or reject what they hear from the experts, and are free to consider their own knowledge and experience in the area. *Vannah v. Bedford*, 111 NH 105 (1971)

4. Substantial Justice

- A balancing of harms. Since every variance by definition does some violence to the integrity of the ordinance, will denial of relief cause a loss to the applicant that outweighs the gain to the public?
- Fundamental fairness and equity
- An aspect of constitutional requirement not to take property without compensation

5. Unnecessary Hardship

- It used to be straightforward but it was never easy. Needed something about the land itself such that literal enforcement of the ordinance would deny the owner all reasonable use of the property. Grey Rocks Land Trust v. Hebron (1992)
- Was so difficult to obtain that ordinances came close to an unconstitutional taking of property rights without compensation.

Simplex v. Newington, 2001

- The old rule was abandoned, and became:
 - 1. Zoning restriction as applied interferes with reasonable use of the property
 - 2. No fair and substantial relationship between restriction and purpose of ordinance
 - 3. Variance would not injure the public or private rights of others
- The rule between 2001 and 2004, and arose from facts dealing with the ***use of property***

Boccia v. Portsmouth, 2004

- Applicant wants a hotel, which is allowed, but needed multiple dimensional variances.
- Court recognized a distinction between limits on use of property, and restrictions arising out of area or dimensional standards
- Simplex remains the rule for use variances
- A new test is created for area variances

The Boccia “Area Variance” Test

- An area variance is needed to enable the use given the special conditions of the property
- The benefit sought by applicant cannot be achieved by some other method reasonably feasible, other than the area variance

Use or Area? How to Tell the Difference

- Harrington v. Warner, 2005.
- A case by case determination, meaning that you are the judge
- If the restriction is to preserve the character of surrounding area, it is a use variance. If the dimensional criteria is to place an incidental limit on a permitted use, it is an area variance.

Examples

- Variance requested in residential zone to permit garage to be located 17 ft from sideline where 20 ft is required. _____
- Variance requested in residential zone to permit retail sale of plants and garden material, when retail sales are prohibited.

But Classify this one:

- In a residential shoreland district, a variance to permit a new single family residence set back 50 ft from the high watermark of the Great Bay as required by RSA 483-A, when 75 feet is required locally, and to permit a height of 43 ft when 35 ft is allowed. The relief is requested to permit installation of a septic leach field and well in compliance with separations imposed by Env-Ws rules.

Reasonableness

- If a use is “reasonable” (perhaps meaning permitted by the ordinance?) then entitled to constitutional deference under Simplex?
- *Vigeant v. Hudson*: If a use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use, but under Simplex, even if a use is reasonable, not enough to vary the ordinance.

And we return to “Special Conditions”

- While we focus on “hardship”, all 5 tests must still be met
- Variances are still not to be granted easily, because they still exempt a property from compliance
- There still has to be something special about the land and the proposed use
- More changes yet to come